ÉTUDES ÉLECTORALES

THIRD-PARTY ADVERTISING DURING AN ELECTORAL PERIOD AND CONTRIBUTIONS MADE TO POLITICAL PARTIES AND CANDIDATES REGARDING THE CHARTERS

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For stylistic purposes, the masculine gender has been used throughout this document in a neutral sense.

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INTRODUCTION

The aim of this document is to make known the problems associated with certain provisions of the Québec Election Act pertaining to the financing of political parties and the control of election expenses within the framework of the Canadian Charter of Rights and Freedoms and the Québec Charter of Human Rights and Freedoms.

The problems center on two main questions, to which the author suggests possible answers. Should everyone be allowed to incur election expenses? Should we continue to allow only electors to contribute to the financing of political parties and candidates?

This document begins by situating the notion of election expenses as defined in the legislation of Québec and Canada and then goes on to draw parallels with the American model. The author subsequently deals with the provisions of the Québec and Canadian Charters to bring to light cases involving the contesting of these legislative provisions under the Charters. He then reports on the jurisprudence on this question in Québec, Manitoba and Alberta.

Still within the framework of legislative challenges under the Charters, the author describes the position taken by the Chief Electoral Officer of Canada and the President of the National Citizens' Coalition, and concludes this chapter on the current deadlock. The author then examines the main principles in question in this debate and takes into account various considerations.

For the benefit of the reader, the author has prepared a list of cases in which other provisions of Canadian legislation such as the voting rights of inmates and the mentally handicapped were contested before the courts under the Charters. A copy of this jurisprudence is appended to the document.

1. NOTION OF "ELECTION EXPENSES"

In Québec, the Election Act establishes that an election expense is:

...402. ...the cost of any goods or services used during an election period to:

(1) promote or oppose, directly or indirectly, the election of a candidate or the candidates of a party;

(2) propagate or oppose the program or policies of a candidate or party;

(3) approve or disapprove courses of action advocated or opposed by a candidate or party;

(4) approve or disapprove any act done or proposed by a party, a candidate or their supporters.

Then, it stipulates that:

...413. During an election period, no person other than the official agent of an authorized party or independent candidate or his deputy may incur or authorize election expenses.[1]

At the federal level, there is some ambiguity in the definition of election expenses. As Mr. Jean-Marc Hamel, then Chief Electoral Officer of Canada, outlined in his 1986 Statutory Report: "(...) the present definition of election expenses is so vague and imprecise that its application to various sections of the Act has become extremely difficult."[2]

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1 Election Act, (Q.R.S. c. E-3.3)

2 1986 Statutory Report of the Chief Electoral Officer of Canada, p. 10.

As a matter of fact, this situation has led some individuals to become braver not only in finding loopholes, but also in challenging the constitutional validity of provisions of the Elections Act.

2. PARALLELS WITH THE U.S. MODEL

As Mr. Warren R. Bailie, Chief Election Officer of Ontario, reported concerning the evolution of the legislation and the enforcement of the Canadian Charter of Rights and Freedoms[3]:

"... The drive for electoral reform experienced by Americans in the mid-seventies was a force not restricted to the United States. In Canada, concerns over disparities in election financing and undue influence in party funding has led a majority of provincial governments as well as the Federal Government to enact legislations which, in varying manners, regulate contributions to candidates and parties, and the financing of electoral campaigns.

As is usually the Canadian experience, the development of such legislation was initially a product of provincial experimentation. In 1963, during the Quiet Revolution, the Government of Québec enacted the first ever Canadian legislation limiting election expenses. In the fifteen years that followed, the provinces of Manitoba, Nova Scotia, Saskatchewan and New Brunswick followed suit as did the Federal Government. In Ontario, the provincial government imposed in 1986 comprehensive limitations on campaign expenditures."

Ottawa implemented legislation in 1974 regulating candidate and party contributions and strictly limiting campaign expenditures. Section 70.1 of the Canada Elections Act (now s. 259 of Revised Statutes of Canada,

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3 COGEL GUARDIAN, Aug. 31, 1989 - Election Finance Law in the United States and Canada: A Tale of Two Cultures, by Warren R. Bailie and David Johnson.

1985, c. C.E.2) stated that no one, except a candidate or a party, may incur election expenses. This broad rule was then mitigated by an exception in subsection 70.1(4), which provided a defence if a person charged established that she incurred the expense for "the purpose of gaining support for views held by him or her on an issue of public policy" or for advancing the aims of any non-political organization in which she was a member and for whom the expenses were incurred. These provisions lasted until 1983, when the ss. 70.1(4) defence was removed from the Act in order to impose a total prohibition on third party advertising.

As my colleague Mr. Bailie pointed out, "the underlying ideas used to promote these legislative developments were very similar to those employed in the United States. There was a concern to regulate individual and group contribution to candidates and parties so as to ensure that the latter could not be placed, or be seen as being placed, in a subordinate, dependent relationship to the former. Moreover, concern was felt in most provinces and at the federal level of government that limitations on campaign expenditures were necessary as a means of assuring that electoral success would not be contingent upon the quantity of wealth deployed by candidates and parties and interest groups but upon the quality of the ideas, policies and records carried by the candidates and parties before the electorate..."[4]

Differing political traditions led to differing forms of election finance law in the United States and Canada. According to the Chief Election Officer of Ontario, it seems that the American law reflects the priority which many Americans accord to the U.S. Bill of Rights and the principles of individual liberty and equality of opportunity which are enshrined in the broader American political culture. In contrast, Canadian law, as it is still developing, reflects the tensions felt by Canadians between the principles of individual liberties and those of collective order and equality of condition. Moreover, this tension is

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[4] COGEL GUARDIAN, Opus Cit.

to be resolved within a constitutional framework and political culture which continue to affirm the principle and the practice of parliamentary sovereignty.

3. THE CANADIAN AND QUÉBEC CHARTERS

The Canadian Charter of Rights and Freedoms, entrenched into the Canadian Constitution in 1982, affirms such individual and collective rights as the right to vote, to converse with the Federal Government in either the French or English languages and equality rights to life, liberty and security of the person, the right to due process of the law, through to rights to be free from various forms of discrimination, and guarantees the fundamental freedoms of association, assembly, expression, belief and religion, as well as of the legal.

Moreover, section 1 of the Charter reads:

> "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The Québec Charter of Human Rights and Freedoms also guarantees freedom of expression since its adoption on June 28, 1976. Section 3 stipulates that:

> "Every person is the possessor of the fundamental freedoms including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of associations."

In keeping with section 1 of the Canadian Charter of Rights and Freedoms, the fundamental rights and freedoms guaranteed by the Québec

Charter may now be limited under an amendment which came into force on October 1, 1983. It involves section 9.1 which provides for the following:

> "9.1 In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.
>
> "In this respect, the scope of the freedoms and rights and, limits to their exercise, may be fixed by law."

In section 52 of the Québec Charter, it is specified that this Charter has priority over every other law:

> "No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter."

As the Québec Election Act contains no provision allowing the sections dealing with election expenses (401 to 431) to apply despite the freedoms and rights guaranteed by the Québec Charter, in particular freedom of expression, it follows that if the provisions of the Election Act were considered as derogating from the Charter and in particular from section 3, the latter should prevail, subject to section 9.1.

4. CHALLENGING OF CURRENT PROVISIONS UNDER THE CHARTERS

Generally, the adoption of legislative provisions intended to limit expenses for the financing of electoral campaigns has been considered as an activity falling under the jurisdiction of the legitimate authority of the federal Parliament or the provincial legislatures. During the sixties and the seventies, the constitutionality of the various federal and provincial limits on candidate and party expenses was never challenged before a Canadian court.

The situation is different with the new Charter, which is binding upon all levels of government in Canada, with the courts being given the power to rule on Charter claims and, if necessary, to hold as null and void any federal, provincial or municipal law contravening any Charter provision.

Thus, the doctrine of parliamentary sovereignty has been significantly attenuated in that legislative acts of the Federal Parliament or of the provincial Legislatures may be overruled by the courts if the acts are deemed to be inconsistent with the Charter and if they do not pass the reasonable limit test set out in section 1.

As a matter of fact, the influence of the Charter has made itself felt since 1982 in that Canadian election laws have already experienced some limited yet significant constitutional review.

In the pages that follow there are a number of cases that were brought to the attention of the courts of Québec, Manitoba and Alberta regarding the provisions pertaining to the financing of political parties, the control of expenses and the application of the Charters.

Readers will find appended certain cases brought before the courts dealing with the application of other provisions of Canadian electoral legislation such as the voting rights of inmates and the mentally handicapped in light of the Charters.

QUÉBEC JUDGMENTS

1° The right of liberty and expression

Roberge v. Attorney General of Québec and Pierre-F. Côté, Pierre-Olivier Boucher, (J.E. 82-298)

When the Referendum of 1980 was held, an elector contested the provisions of the Referendum Law prohibiting every person other than the official agent of a national committee to incur

referendum expenses, and alleged that this infringed on the right of liberty of expression guaranteed by the Québec Charter of Human Rights and Freedoms. In 1982, before the Canadian Charter came into force, the Québec Superior Court upheld the expense limitations, stating that it did not find the referendum legislation to be in conflict with the Québec Charter.

2° Freedoms of expression and association; the right to eligibility

Parti Union Nationale et al. v. Pierre-F. Côté and Attorney General of Québec, (1989) R.J.Q. 2502

On June 19, 1989, the Chief Electoral Officer of Québec withdrew the authorization of the Union Nationale Party for failing to comply with the provisions of the Election Act respecting the payment of invoices, accounts and interest on loans. The Union Nationale Party requested the revision of this decision by the Court.

In a judgment made on September 7, 1989, the Honourable Thérèse Rousseau-Houle, Judge at the Superior Court, rejected this petition. According to the judge, freedom of expression is not infringed upon or there are reasonable limits to it in a free and democratic society; freedom of association is not infringed upon by this withdrawal since the members may continue to work together for a common cause; the right to eligibility is preserved as a member of the Union Nationale Party may still be a candidate.

MANITOBA JUDGMENTS

1° The freedom of expression and religion

Re Mackay et al. and Government of Manitoba, 24 D.L.R. (4th) 587

In this case, Manitoba's Act respecting Election Funds was challenged on the grounds that the partial reimbursements of

expenses granted to candidates and parties constituted a violation of both freedoms of religion and expression, guaranteed by section 2 of the Charter in that the plaintiff's tax money was being used to finance candidates and parties to which he was opposed.

In the Court of Queen's Bench, the trial judge held that the legislation did not infringe on freedom of expression as set out in section 2(b) of the Charter. In the majority, the Manitoba Court of Appeal was of the same view.

On September 14, 1989, the Supreme Court held that the appeal should be dismissed in the absence of any factual base presented by the appellants [(1989) 2 RCS 357]. In the reasons for judgment written by Honourable Mr. Justice Cory it was concluded:

> "These issues raise questions of importance pertaining to financing candidates in provincial elections that are obviously of great importance to residents of Canada or any democracy. It would be irresponsible to attempt to resolve them without factual background."

However, Honourable Mr. Justice Cory added that he could not accept the contention that statutory funding of candidates infringes on the taxpayers' right to freedom of expression. He wrote that:

> "The Act does not prohibit a taxpayer or anyone else from holding or expressing any position or their belief in any position. Rather, the Act seems to foster and encourage the dissemination and expression of a wide range of views and positions. In this way it enhances public knowledge of diverse views and facilitates public discussion of those views".

This is, undoubtedly, the criterion that Courts may eventually apply when they must decide on the constitutional validity of election laws preventing third-parties from intervening during an election period, in consideration of the freedom of expression guaranteed by the Canadian Charter of Rights and Freedoms.

2° <u>The right of expression and the right to equality</u>

<u>Re The Election Finances Act, S.M. C 45 cap. E32 and David Blake</u> (not reported)

In this case, heard by the Provincial Court of Manitoba in March 1988, the same statute was challenged. The plaintiff, a provincial member found to have violated the advertising expenditure limit (D.51(2)), claimed that the limits imposed on election expenses were a violation of sections 2 and 15 of the Charter and argued that this was a violation of his personal right of expression and of his right to be treated on an equal footing with groups that are not subject to the limit. Mr. Justice A.F. James rejected this double claim arguing that the purpose of the imposed limits was reasonable to insure equal chances for the candidates and parties and that such a restriction did not violate the individual's right to equality since the latter had knowingly decided to participate in the election as a candidate. According to the judge, the purpose of section 15 is to deal with similar cases in a similar way, and that in the case in question all the candidates had to comply with the same regulation.

ALBERTA JUDGMENT

Freedom of expression

National Citizens' Coalition v. A.G. of Canada, (1984) 11 D.L.R. (4th) 481

This is a very important case concerning the Elections Act. In this matter, a challenge was directed against the prohibition of "third-party advertising" contained in the federal Elections Act on the grounds that the Act's prohibition violated the Charter's guarantee of freedom of expression. Shortly before the general election of September 1984, the Alberta Court of Queen's Bench upheld the claim of the plaintiff ruling that the restriction found in ss. 70.1(1) and 72 of the Act (now ss. 259 and 261 of Revised Statutes of Canada, 1985, c. C.E.2) did contravene the Charter. A few excerpts from this judgment are especially noteworthy:

Pages 486 and 487:[5]

> "... The sections in question are said by the defendant to result in a greater exchange of opinions and ideas that would otherwise be the case as a result of protective measures and the result is a system with greater fairness and openness. I believe, however, that the sections on their face do limit the actions of anyone other than registered parties or candidates from incurring election expenses during the prescribed time and in this sense there is a restriction on freedom of expression."

Applying the test of section 1 of the Charter, the judge refers to the statements of the Barbeau Committee and the Chappell Committee, on page 495:

> "...The justification for the limitation is said to be the need to ensure a level of equality amongst all participants in federal elections. According to the statements of the Barbeau Committee and the later

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5 Dominion Law Reports.

> Chappell Committee as well as representatives of all three political parties, it is beneficial to the electoral system to have spending restrictions on the part of parties and candidates at election time. This benefit, it is said, would be lost if such restrictions were not extended to third-parties during the same period. This is the justification of the value gained by society in limiting the freedom of expression as set out in the 1983 amendments to the Elections Expenses Act."

Finally, the judge concludes on page 496:

> "...In my opinion the limitation must be considered for the protection of a real value to society and not simply to reduce or restrain criticism no matter how unfair such criticism may be. It has been said that the true test of free expression to a society is whether it can tolerate criticism of its fundamental values and institutions. A limitation to the fundamental freedom of expression should be assessed on the basis that if it is not permitted then harm will be caused to other values in society. This requires, as has been said, a balancing of the respective interests of society and of the individual.
>
> Care must be taken to ensure that the freedom of expression, as guaranteed by s. 2 of the Charter, is not arbitrarily or unjustifiably limited. Fears or concerns of mischief that may occur are not adequate reasons for imposing a limitation. There should be actual demonstration of harm or a real likelihood of harm to a society value before a limitation can be said to be justified."

In the days following the Court decision, which took place shortly before the September 1984 general election, the federal government publicly agreed with it, saying this infringement of free speech should not have been allowed, and Mr. Don Johnson, then Attorney General of Canada, announced that he would not appeal this decision.

Position of the Chief Electoral Officer of Canada

In August 1988, Mr. Jean-Marc Hamel, Chief Electoral Officer of Canada, commented in the following terms on the situation, before Québec

parliamentarians responsible for electoral reform[6]:

"...In my opinion, the injustice lies in the fact that we have a series of rules that govern the behaviour of those who take part in elections, i.e. candidates and political parties. Yet these restrictions do not apply to third-parties. The way I see it, it is totally unfair for those who wish to run as candidates for a public office.

At the time the case was being fought in Alberta, we had hoped that the provinces would have been able to join the Attorney General of Canada as it was a case involving the Charter, but they preferred to abstain. If the case had been appealed, we might have insisted more.

The decision was binding only in Alberta, but we decided that since we could not enforce the section in Alberta, we could not enforce it anywhere in Canada to maintain uniformity.

As a result, s. 70.1 has become a paper tiger, still in effect in all jurisdictions except Alberta but unenforced by the Chief Electoral Officer. It is now easier than ever in Canada for single issue organizations and interest groups to go beyond promoting the issue they favour to become directly involved in the support or opposition of parties or candidates during election campaigns, and this complete lack of control is very threatening for the democratic character of the electoral process."[7]

During the 1988 elections, millions of dollars were spent debating in the media the merits of Free Trade and the abortion issue. Provincial governments, municipal governments, trade groups, Chambers of commerce,

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6 Commission des Institutions, August 24, 1988.

7 Political Financing: Studies on Election Spending Limits and Party Leadership Campaigns (Commission on Election Contributions and Expenses, 1986), p. 31.

associations, unions and concerned citizens jumped into the fray. At times, it seemed as if the election was being fought by persons who were not running.

Position of the president of the National Citizens' Coalition

In July 1989, Mr. David Somerville, president of the National Citizens' Coalition, was a guest speaker at the annual Conference of Canadian Election Officials held in Regina. Invited to debate "The pros and cons of election finance administration - promoting or impeding the democratic process", he expressed his views in these terms:

"...The first reason generally given for laws governing donations to political parties and expenditures of political parties is to open up this donor system to prevent corruption of the political process, forcing people to disclose their identity when they donate to parties and candidates. In my opinion, believing this will somehow prevent corruption is laughable." He added that whichever law is passed, people who do not intend to respect the laws won't be deterred and still will engage in corrupt activity.

Maintaining that two powerful groups already threatened the Coalition (that if they can ever find out who are their supporters they will exert all the pressures and boycotts to stop them), Mr. Somerville insisted on the need for protecting privacy and giving individuals the freedom to put their money where their minds are, without fear of exposure.

The second reason for such legislation being to provide a level playing field to introduce fairness and equity, Mr. Somerville presented the results of a national poll (conducted by Angus Reid in December 1988) according to which 73% of respondents said it wouldn't matter to them if some candidates spend more money than others in their campaigns. Mr. Somerville maintained that believing Canadian votes can be bought through clever and lavish advertising is an insulting argument. This is contrary to the findings of all studies made in the past 20 years on the

role of money in politics, mainly those conducted by Mr. Seymour Isenberg, who was able to establish in 1980 and 1981 the definite relationship between spending and electoral success. When Mr. Reagan was first elected in 1980, PACs spent more than 12 million dollars to support his campaign while his opponent, Mr. Carter, received a scant $46 000[8]. If money does not buy votes, one man then ask why did the National Citizens' Coalition bother to spend $848 000 during the last federal election.

Mr. Somerville finally argued that a significant number of Canadians refusing to support political parties and wishing to act as a group of concerned citizens gave money to the Coalition so it could express their ideas. On the contrary, facts are proving that there are more and more people who understand that according to our electoral system, political parties are the only players allowed to play the game during an election period.

Today's deadlock

If the Alberta Court decision would have been challenged in the Supreme Court of Canada, it could have been ruled that, as provided for in section 1 of the Charter, the prohibition concerning the intervention of third-parties during an election period involves "reasonable limits as can be demonstrably justified in a free and democratic society".

Moreover, in the opinion of leading constitutional experts, that Court would have overturned the decision on the grounds that the Alberta Court failed to properly interpret section 1 of the Charter, and upheld the legislation on the basis of reasonableness; that is the Federal Government could probably have made out a case for the need for third-party campaign expenditure restrictions, so as to ensure equity and

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8 As reported by Me Yvon Tarte, Executive Director and General Counsel, Elections Canada, in a speech on third-party advertising addressed in Québec City, February 1989.

fairness in the electoral process, while being able to argue that the legislation regulates expression only during the election period.

Conclusion

As we were able to read in the Review of judicial control prepared by the Chief Election Officer of Ontario, these cases give an indication of the type of questions that individuals and groups may raise alleging that federal and provincial election laws violate their rights guaranteed under the Charters. Moreover, these cases are only the first ones. It may well happen that an entire series of provisions found in the various federal and provincial laws relating to elections will one day or another be challenged before the Courts under the Charter.

5. THE MAIN PRINCIPLES IN QUESTION

5.1 To leave to parties the control over power and political activities

Indeed, in Canada, political parties play a much greater role than in the United States. In the case of our neighbors to the south, a senator elected as a Democrat can vote like the Republicans. There is no party line or ministerial responsibility. The parties are basic electoral organizations, with tendencies that group people more or less according to their financial means. A Republican President is not obligated to have Republicans in his cabinet. He may appoint anyone. In the United States, elected members, no matter what their political affiliation, commonly form alliances to pass bills.

On the contrary, in Canada, the party line plays a very important role that goes all the way up to ministerial responsibility. When unity no longer exists, the Prime Minister must resign or call

elections. A minister who does not agree with a bill put forward by his colleagues feels obliged to resign. This happened recently in Québec when three well-known English ministers felt they had to give up their portfolios of Justice, Communications and Environment to protest Bill 178 intended to regulate the use of English in public signs and posters in the province. At the federal level, the Prime Minister of Canada is the Head of the government and it is unthinkable that he would turn to members of the opposition to form his cabinet. Moreover, political activities are mainly controlled by the parties. If third-parties were allowed to intervene at any time and in any manner, this control would be threatened. That explains why third-party intervention is even more threatening in Canada than in the United States.

As worded Professor Khayyam Zev Paltiel who testified before the Alberta Court in 1984, "what is at stake is not simply the core of the controls on election expenses and equitable elections, but, as experience elsewhere has shown, the very nucleus of responsible cabinet government and the disciplined party system on which it rests..."[9]

In Québec, parties must be authorized and expenses are limited. Political power is not left in the hands of financiers or third-parties. It is the public that controls political power through political parties, for contributions must come from electors and not from corporations. This approach protects the free exercise of the right to vote and, as a result, insures that democracy is respected.

5.2 To preserve the autonomy of elected representatives

The influence of private funding sources may diminish the ability of elected officials to respond to demands of other important

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[9] Me Yvon Tarte, Op. Cit.

segments of society. The pursuit of short-term goals of specific interest groups also tends to disrupt long range planning and coordinated policymaking. How can an administration elected with the financial participation of pressure groups afterwards not feel obligated to protect the interests of its benefactors? The relation has, in fact, been aptly described by Senator Robert Dole of Kansas[10]:

> "When these PACs give money, they expect something in return other than good government."

That "something" is the vote of legislators on key issues, and is therefore quite often detrimental to the public interest.

In the long run, the intervention of third-parties constitutes a tainted option: not because the ideas advocated by third-parties are bad, but rather because of the ties that are inevitably forged between the candidates and third-parties.

On the other hand, the sharing of election financing among electors as a whole to free this financing from the control of economic powers and well-endowed pressure groups promotes a cleaning up of electoral practices and a pluralism of ideas.

The electors are increasingly aware of the risk of our governments having their "feet tied". Where is liberty? We talk about freedom of expression, and the result is that the persons elected by the people are no longer free to act. How can they freely exercise the public administration if they owe everybody something? In the name of liberty, we are enslaving our elected officials. A candidate is asked if he is for or against such and

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10 Time Magazine, June 6, 1988, p. 24, as reported in A Comparative Survey of Election Finance Legislation, Op. Cit., p. 130.

such a measure. If the answer he gives corresponds to the opinion that is hoped for, the candidate is offered donations. Once elected, he must vote accordingly.

5.3 To avoid all types of abuse

It is certain that prohibiting third-parties from spending sums of money during an election period goes against the notion of freedom of expression; but is it in the name of freedom that we must not have speed limits on the highway? Is it in the name of freedom of expression that we must allow people to say anything, any time and in any manner without any notion of libel?

Do we really want to undergo, like our neighbours to the south, the phenomenon of negative advertising? Americans have come to the point that this total liberty has led the public to lose confidence in democracy.

In the political field, freedom of expression must be subject to the goal we wish to attain, which is to elect the best persons possible to exercise the duties of elected officials and to administer public affairs.

What we seem to have lost sight of is the prime objective pursued throughout the election campaign, namely to elect people to govern. Allowing corporations and institutions to intervene by way of advertising, exerting pressure or lobbying, by spending unlimited amounts of money to induce the elector to vote for or against someone is just opening the door to abuse.

5.4 To maintain a certain level of equity between the rich and the poor

The aim of the control of election expenses is to insure a certain fairness among candidates in the election. This advantage

would soon be lost if no restriction applied to third-parties. If the controls on election expenses did not exist, what would prevent the country's wealthy ones from deciding that they have had enough of the government and bringing to power people that would govern according to their will? What would prevent them from investing all the money they want in the form of advertising or in another form? That is how things worked in Canada last century. In Québec, Premier Taschereau was in power for 40 years thanks to the support of forestry companies; Duplessis counted on the support of Iron Ore. At the time of Borden, Saint-Laurent and Mackenzie King, party money came from big companies.

As Mr. Donald C. MacDonald, Chairman of the Commission on Election Finances of Ontario recently asked: "Do we want the return of clandestine exercises like those that made up the financing tradition in Canada? Let's just recall two of them:

1. In 1872, Sir John A. MacDonald, seeing his party was short of money, wired the developers of Canadian Pacific Railways who provided him immediately with the $10 000 he needed.

2. In the 1930 election, the (Federal) Liberal Party got some $750 000 from the company that was building the Beauharnois canal."

In the late fifties and sixties, the democratic process had become in Canada a rich man's game, replete with corrupt practices such as treating and personations. This was a time when nobody knew exactly what was going on, where the money was coming from...

Although a perfect campaign finance system has yet to be developed, experience indicates that the most effective reforms have had as a central component a Public Subsidy Program. The

intentions of publicly funded campaigns are to provide a reasonable, but fixed limit on political funds, distributed equitably to all viable contenders, and to lessen the possibility of corruption by removing private funds from campaigns.

One point is particularly clear: public financing and third-party interventions are fundamental opposites.

5.5 One elector/one vote

In an editorial appearing in the April 30, 1990 issue of the "Le Soleil" newspaper, Raymond Giroux wrote the following:

> "The common good requires that certain restrictions be placed on the expression of liberty. The North American trend to equate corporations with natural persons has given rise to a new scale of values which eventually will work against democracy."[11] (free translation)

That a corporation (or a legal entity as it is called in Québec) can contribute to the election campaign of a candidate is always possible, although full of risks. But that it be able to make unlimited contributions is dangerous; moreover, this practice may give the impression to the elector that his vote does not have so much weight any more. The well-recognized principle in democracy of "one elector/one vote" would be greatly weakened.

5.6 To control election expenses

Moreover, if we allow third-parties to incur expenses, even limited ones, how do we control the latter? It would seem that no one has as of yet found an effective solution.

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[11] Raymond Giroux, "Le Soleil", 30 avril 1990.

In April 1988, the Québec Press Council made representations in this respect before a parliamentary commission in charge of studying the new Québec Election Act. A summary of this intervention will be found in the 1988-1989 Annual Report of the Conseil de presse (Press Council) (pp. 25 and 26). While acknowledging the need to control election expenses, the Council suggested amending the definition of "election expenses" by limiting control solely to those groups formed for the purpose of influencing an election. Unfortunately, the Council could not propose any means of controlling such expenses. Moreover, parliamentarians concluded that it was extremely difficult to define a group formed for the sole purpose of influencing an election.

6. VARIOUS CONSIDERATIONS

6.1 What the candidates and the parties think

In those cases where third-party intervention is allowed, some people suspect that candidates and parties are fed up with the limited number of independent expenditure groups that seem to possess unlimited financial resources, and would prefer to rely on limited individual contributions made by the thousands of electors they want to represent.

In the province of Québec, where only electors can make annual contributions up to $3 000 per party and independent candidate, and where full disclosure of the amounts donated is mandatory, responsible parties usually succeed in collecting all the funds they need for their daily administration and for an election (their revenues being supplemented by a public financing formula based on the number of votes they obtained at the last general election...) Thus, the survival of parties is in no way threatened when the financial transparency of political entities is insured by a system.

6.2 The need to be vigilant

Moreover, "if election finance laws are expected to be effective, they must be enforced by the body charged with the responsibility of overseeing their implementation".[12]

Since the advent of the Canadian Charter of Rights and Freedoms, Québec has witnessed two election campaigns. In 1985, three unions or professional associations were prohibited by the Chief Electoral Officer of Québec from broadcasting advertisements or distributing pamphlets denouncing certain government policies. At the time, newspaper editorialists strongly denounced the act as unbearable interference with the freedom of expression, despite the fact that it contains certain exceptions which allow for certain modes of expression: the latter take mainly the form of articles, editorials, news, columns, news programs or comments which may still be published and broadcast, even during an election period, and that the prohibition is only in effect during a period of 47 days every four years. During the rest of time, people can spend money to say what they want to say.

In the years after, a revision process of the legislation took place, during which the issue of third-party intervention was studied without any amendment being brought at the outcome.

So Québec's latest Election Act, which came into force on April 24th 1989, continues to prohibit third-parties from incurring, during an election period, expenses likely to favour, directly or indirectly, the election of a candidate or a party. Following the coming into force of the new Act, the Chief Electoral Officer of Québec announced his firm intention to strictly apply these provisions in the future... Thus, at the time of the last

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12 A Comparative Survey of Election Finance Legislation, 1988, Ontario Commission on Election Finances, p.38.

election campaign, he sent out more than thirty formal notices to put a stop to third-party interventions. Everyone complied with them.

The formula chosen by the Québec legislator thus leaves to recognized political parties and candidates the privilege of incurring election expenses. It then becomes relatively easy to control the sums involved by imposing limits and the obligation to submit reports. The responsibility of the election campaigns is first and foremost that of the candidates and the political parties, within the financial limits set by law. That is what is important. The financial power of intervening third-parties does not become a means of preventing voters from freely exercising their right to vote.

During a precise and very short time period, the rules of the game are not the same: there are indeed certain impediments to freedom of expression. Why? Because we must strictly control election expenses, protect electors, protect the free exercise of the right to vote and, in so doing, protect democracy. We do not want to find ourselves with hidden funds in a context where it costs a great deal to have a member elected to the National Assembly.

CONCLUSION

The preceding reflexions and comments are not meant as a definitive answer to the questions raised. The author simply endeavored to stimulate the debate, in order to add to the reflection. He describes the problems associated with the application of the various provisions of the Québec Election Act regarding the financing of political parties and the control of election expenses in relation to the Québec and Canadian Charters.

It is the author's hope that this document will enlighten readers and will contribute to the reflexion of all those interested in this vast question which directly affects the conditions for implementing democracy, a tool of freedom and justice.

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Chairman, Commission de la représentation électorale

Mrs. Micheline Bégin, research agent at the office of the Chief Electoral Officer, assisted in the drafting of this paper.

APPENDIX

JURISPRUDENCE RELATED TO THE APPLICATION OF OTHER PROVISIONS OF CANADIAN ELECTION LEGISLATION AND THE CHARTERS

JUDGMENTS AT THE FEDERAL LEVEL[13]

During the last general election of November 21, 1988 a number of cases were brought to Courts relating to the qualifications of electors and the process of enumeration:

1° The right to vote of the mentally handicapped

Canadian Disability Rights Council et al v. The Queen, (1988) 3 C.F. 622

In a judgment made October 17, 1988, Mrs. Justice Reed, of the Trial Division of the Federal Court, declared section 14(4)(f) of the Canada Elections Act, which prohibited persons from voting in federal elections if they were deprived of management of their property, or of freedom of involvement by reason of mental disease, to be invalid in that it conflicted with section 3 of the Canadian Charter of Rights and Freedoms, which states that every Canadian citizen has the right to vote.

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13 Most of these examples are taken from The Charter, the courts and Election Law: review of judicial control, a document presented at the July 1988 Conference of Canadian election officials, by Warren R. Bailie.

2° **The right to vote of judges**

Muldoon and Teitelgaum v. The Queen and Attorney General of Canada, (1988) 3 C.F. 628

On November 3, 1988, Mr. Justice Walsh, a Deputy Judge of the Trial Division of the Federal Court, found in favour of an uncontested action launched by two judges of the Trial Division of the Federal Court, who challenged the voting disqualification in section 14(4)(d) of the Canada Elections Act, which applied to judges appointed to office by the Governor-in-Council. Attorneys for the Government admitted that the disqualification was not a "reasonable limit prescribed by law" within the meaning of section 1 of the Charter.

QUÉBEC JUDGMENT

The right to vote of prisoners

Lévesque v. Attorney General of Canada, (1986) 2 C.F. 287

Before the 1985 provincial election in Québec, the Federal Court of Canada, in response to a petition filed by an inmate, granted all inmates of federal penitentiaries located in Québec the right to vote, in keeping with section 3 of the Canadian Charter of Rights and Freedoms. The Court ordered the Chief Electoral Officer of Québec to enumerate the inmates and to set up polling stations in the prisons. The Solicitor General of Québec did not appeal this decision.

ONTARIO JUDGMENTS

1° **The right to vote of prisoners**
Grondin v. Attorney General of Ontario, (1988) 65 O.R. (2d) 427

On July 19, 1988, Mr. Justice Bowlby of the Supreme Court of Ontario struck down as unconstitutional section 16 of the Ontario Election Act barring prisoners from voting. Mr. Justice Bowlby stated that the disenfranchisement of prisoners was unreasonable and arbitrary, particularly as it took on notice of the circumstances surrounding a prisoner's incarceration.

2° **Inmates' right to vote**
Sauvé v. Attorney General of Canada, (1988) 66 O.R. (2d) 234

In this case, Mr. Justice Van Camp of the Supreme Court of Ontario ruled on November 7, 1988 that sub-paragraph 14 (4) (e) of the Canada Elections Act - now paragraph 51 (e) of the Revised Statutes - which disqualifies from voting "every person held in a penitentiary establishment and serving a sentence for having committed any offence", passed the test of the first article.

However, practically at the same time, Judge Hirschfield, of the Manitoba Court of Queen's Bench, ruled to the contrary in the case of Badger v. Attorney General of Canada, 55 M.R. (2d) 211. This latter decision was subsequently overturned by the Manitoba Court of Appeal (55 M.R. (2d) 298 - (1989) 1 W.W.R. 216).

MANITOBA JUDGMENTS

1° **The right to vote of the mentally handicapped**

On March 17, 1988, Mr. Justice Glowacki of the Court of Queen's Bench of Manitoba issued an order and declared that the disqualification of patients in mental hospitals from voting in provincial elections was

unconstitutional. The relevant words of section 31(b) of the Manitoba Elections Act were pronounced void and of no effect whatever in law. The Attorney General for Manitoba declined to oppose the action filed by the Manitoba Division of the Canadian Mental Health Association and offered no arguments to possibly justify the disqualification as a reasonable limit under the Charter.

2° Inmates' right to vote
Badger et al. v. A.G. of Canada, (1989) 1 W.W.R. 216

In this case, mentioned earlier in the text, an appeal was lodged before the Manitoba Court of Appeal concerning a decision by the Court of Queen's Bench declaring that ss. 14(4)(e) of the Canada Elections Act was in violation of section 3 of the Canadian Charter of Rights and Freedoms.

In an unanimous judgment, the Court of Appeal overturned the decision of the first instance on the grounds that even if ss. 14(4)(e) went counter to section 3 of the Charter, which is not certain (according to Judge Monnin), this constitutes a reasonable and justifiable limit in a free and democratic society. The right to vote is not absolute and, according to Judge Lyon, it must be envisaged within a historical dimension.

SASKATCHEWAN JUDGMENT

The right to vote of prisoners
Maltby et al. and A.G. Saskatchewan, (1982) 143 D.L.R. (3rd) 649

In this case, the Court of the Queen's Bench of Saskatchewan decided that accused prisoners who have not yet heard their sentence are not deprived of their right to vote during provincial elections. The Court affirmed that the fact that prison wardens refused inmates the opportunity to exercise their right to vote constituted a violation of section 3 of the Charter.

BRITISH COLUMBIA JUDGMENTS

1° **The right to vote of absent persons**
Hoogbruin v. A.G. British Columbia, (1986) 70 B.C.L.R. 1

In this case, the Court of Appeals of British Columbia overturned a decision of the Supreme Court, namely that the absence of a voting procedure for absent voters in this province did not constitute a violation of section 3 of the Charter. The Court of Appeals judged that this omission did indeed violate section 3, since the decision to not set up a voting system for absent voters could not be shown as being justifiable in a free and democratic society, as this type of system exists at the federal level and in most provinces.

2° **The right to vote of persons on parole**
Reynolds and A.G. British Columbia, (1982) 143 D.L.R. (3rd) 365

In this case, the Supreme Court of British Columbia decided that refusing persons on parole the opportunity to exercise their right to vote during provincial elections constituted a violation of their rights under section 3 of the Charter.

3° **The provincial electoral map and equality of the right to vote**
Dixon and A.G. British Columbia, (1989) 59 D.L.R. (4d) 247

In this case, Chief Justice McLachlin of the Supreme Court of British Columbia ruled unconstitutional the Act establishing the electoral map of this province and concluded that the major discrepancies caused by the electoral division boundary establishment process are not justifiable under section 1 of the Canadian Charter of Rights and Freedoms.